IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1999

Supreme Court, U.S.
FILED
99 814 NOV 9 1999
OFFICE OF THE CLERK

COTA B. ALLEN, LEON BEE, RICKEY BILLINGSLEY, CHARLES DOYLE, MANSON C. FORSTER, LAWRENCE HANCOCK, JIM INGRAHAM, CHARLES HESTER, JOE LEWIS, LARRY MORRIS, ERNEST POINTER, III, CLIFFORD W. ROBINSON, ANDREW TAYLOR, WILLIS WARNER, IRA L. WHITFIELD BERNARD WOOTEN

PETITIONERS

V. NO._____

ENTERGY CORPORATION; ARK. POWER AND LIGHT CORP; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 750 AND 647

RESPONDENTS

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Darrell F. Brown
DARRELL F. BROWN AND ASSOC. P.A.
300 Spring St. Suite 515
Little Rock, AR. 72201
(501) 376-1845
AR Bar No. 72012

David O. Bowden
BOWDEN LAW FIRM
P.O. Box 56500
Little Rock, AR. 72215-6500
(501) 312-2889
AR Bar No. 89119

ATTORNEYS FOR PETITIONERS ALLEN et al

61 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether testing procedures utilized to eliminate long term black employees from their jobs were required to be validated against the actual job performances sought and as performed at the company in question.

2. Whether an existing, valid, non-discriminatory seniority system which assured equal minority opportunity could be abandoned in favor of standardized testing instruments that arguably discriminate against African-American employees already on the job and performing same satisfactorily.

3. Whether an affidavit prepared by an electrical industry researcher based on research done in the 1970's from sources of information peculiarly within the control of the said industry, required a point by point refutation in order to defeat a motion for summary judgment under Rule 56, given the existence of a valid and non-discriminatory equal opportunity regimen already in place.

PARTIES TO THIS PROCEEDING

All parties are as listed in the case caption. No corporate or business entity is involved in this matter as a party other than Entergy Corporation, and Arkansas Power and Light Corporation, which is a wholly owned subsidiary of Entergy. Locals 750 and 647, IBEW, are union locals at the affected facilities.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... 2

PARTIES TO THIS PROCEEDING..... 4

TABLE OF CONTENTS..... 5

TABLE OF AUTHORITIES 6

CITATION OF OFFICIAL REPORT OF OPINION 8

STATEMENT OF JURISDICTION OF THIS COURT..... 8

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE:..... 9

STATEMENT OF THE CASE..... 9

ARGUMENT..... 14

CONCLUSION..... 38

APPENDIX 39

TABLE OF AUTHORITIES

CASES:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). . . 26, 27, 30, 32, 36, 45, 55, 57

Allen et al v. Entergy et al, LR-C-95-812, Slip Op. March 25,1998 (unpublished opinion). 8

Bradley v. Pizzaco of Nebraska, Inc., 7 F3d 795 (8th Cir. 1993). 38

Connecticut v. Teal, 457 US 440 (1982). 22

Davey v. City of Omaha, 107 F3d 587 (8th Cir 1997) 20, 30

Gillespie v. State of Wisconsin, 771 F2d 2035 (7th Cir 1985) cert den. 474 US 1083..... 27

Griggs v. Duke Power Co., 401 U.S. 424 (1971). 14, 19, 20, 22, 25, 26, 30, 31, 32, 36, 45, 49, 55, 57

Hawkins v. Anheuser-Busch, Inc. 697 F2d 810 (8th Cir 1983) 38, 55

Houghton v. SIPCO, Inc. 38 F3d 593 (8th Cir. 1994)..... 22

Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991). 18

Krauel v. Iowa Methodist Medical Center, 95 F3d 674 (8th Cir 1996) 22

N.A.A.C.P., Inc. v. Town of East Haven, 70 F3d 219 (2nd Cir. 1995) 27

Nash v. Consolidated City of Jacksonville Duval County, 895 F.Supp 1536 (M.D. Fla 1995) 27

Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 19, 20, 21

STATUTES, REGULATIONS, CONSTITUTIONAL PROVISIONS:

42 U.S.C. Section 2000e-2(h) . . 9, 12

42 U.S.C. Section 2000e-2(k). 9, 19, 20, 31, 55

CITATION OF OFFICIAL REPORT OF OPINION

U.S. Dist. Ct., E.D. Ark, Western Division LR-C-95-812, Slip Op. March 25,1998 (unpublished opinion).

Court of Appeals for the Eighth Circuit, Opinion delivered June 22, 1999, Published Allen v. Entergy, 181 F3d 902 (8th Cir 1999)

STATEMENT OF JURISDICTION OF THIS COURT

A. Date Judgment Entered: Dist Ct.--March 24, 1998; Court of Appeals--June 22, 1999;

B. Orders on Rehearing or Extension: Rehearing Denied August 10, 1999.

C. Reliance on Rule 12.5: None

D. Statutory Basis for Writ of Certiorari: 28 USC Section

E. Special Notifications Under Rule 29: None

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE:

42 U.S.C. § 2000e-2(h), et seq.
42 U.S.C. § 2000e-2(k), et seq.

STATEMENT OF THE CASE

Petitioners were employees of Arkansas Power and Light Company, a wholly owned subsidiary of Entergy Corporation. They were employed in either of two fossil fuel powered electrical generating plants in Arkansas. Each is black and of African-American origin. They were laid off as a result of an alleged reduction in force conducted by Entergy in May of 1995, even though each retained seniority and experience greater than that of white employees, who were not so terminated. It is the contention that the otherwise racially

neutral procedure for selecting employees for termination that was utilized by Entergy had a disparate impact upon persons of the black race and that the Defendant International Brotherhood of Electrical Workers (I.B.E.W.) did not represent the interests of their minority membership but rather acquiesced to the demands of Entergy.

The issue between the parties is business necessity. Certain tests developed by the electrical power industry's Edison Electric Institute were required of Petitioners. These tests, known respectively as Plant Operator Selection System ("POSS") and Power Plant Maintenance Positions

Selection System ("MASS") were given as selection criteria for their termination. The I.B.E.W. bargained away the then existing seniority and work experience system which had traditionally been the touchstone for selection of workers for lay off within Entergy and agreed to the implementation of POSS and MASS in its place. Petitioners were given POSS and MASS tests relating to other jobs than those which they performed within the Entergy System. When they failed these tests, they were terminated in the reduction in force.

The Respondents moved for summary judgment. Disparate impact was not contested. It was Respondents' assertion

that POSS and MASS were valid testing procedures for evaluating the job performance of Petitioners and that no other alternative selection procedure producing a non-disparate impact would suffice.

Petitioners responded that the seniority system, which is recognized by statute - 42 U.S.C. § 2000e-2(h), was itself a valid system for layoffs which had little or no disparate impact upon black employees.

The District Court held for Respondents ruling a prima facie case of disparate impact had been "assumed" by both sides and was therefore established and that Respondents had met their burden of proving job relatedness and

validation, while Petitioners had not refuted the job relatedness. Under a "pretext" analysis, the Court held that since the expert witness for Entergy had declared that there was no other selection system that would do a better job of selecting employees, the seniority would not be considered. Plaintiffs had "failed to show that other tests or selection devices, without a similarly undesirable racial effect, would serve the employer's legitimate interest in efficient and trustworthy workmanship." (Slip Op. Page 5-6).

The Court of Appeals for the Eighth Circuit affirmed the District Court. The question of the validity of the POSS and MASS tests as applied to these jobs versus the seniority system in this particular situation was never addressed. The lower court decisions run contra to the decision of this Court in Griggs v. Duke Power Co. 401 U.S. 424 (1971) as reinstated by Congress through amendments to Title VII.

ARGUMENT

I. INTRODUCTION AND SUMMARY

The District Court had to find that Petitioners could prove no set of facts which would support their case for disparate impact. Since the parties and the District Court have agreed that a

prima facie case of disparate impact was present, the burden of persuasion should have shifted to the Respondents to prove that the POSS and MASS tests were valid and job related. Validity and job relatedness do not exist in a vacuum.

Although Respondents presented some historical evidence about the construction of the said tests, nothing before the District Court showed that these tests had validity to the specific jobs of Petitioners as they were actually performed within the Entergy system. If the POSS and MASS tests were otherwise valid, they were utilized in an invalid fashion, having been designed by their own terms primarily to be given to new hires to test aptitudes and abilities in

such jobs and also for jobs which Petitioners were not required to perform.

Entergy had experience and work-related actual ability for Respondents to review, but chose these tests, even though experience and seniority were more job related and specially protected within the corpus of employment discrimination statutes, setting Petitioners and others similarly situated to fail.

Assuming, without admitting, that Respondents properly carried their burden and that Petitioners could prove no set of facts calling the job-relatedness and validity of POSS and MASS then the question still arises of whether or not

there is any other system of selection that would be as good without the disparate impact of the POSS and MASS tests. The District Court improperly limited methods of implementing selection criteria to consideration to other testing devices and Petitioners' assertion that a seniority system is, itself, a selection device with the qualities desired was summarily rejected. Moreover, seniority and job performance evaluations would select for skills and behaviors actually performed at Entergy plants rather than some theoretical industry-wide norm.

II. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED

A. INTRODUCTION

Summary judgments should only be

granted in those rare instances where there is no dispute of fact and where there exists only one conclusion. Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991).

Summary judgment has specifically been held to be a device that should be rarely granted in cases alleging employment discrimination. Johnson v. Minnesota Historical Society, 931 F2d 1239, 1244 (8th Cir 1991).

Petitioners produced affidavits relating to the jobs and their individual performances. Respondents relied upon the canned industry-generated affidavit of Dr. David Kleinke, who has no demonstrated personal knowledge of the Entergy System. The lower courts

effectively (and impermissibly) shifted the burden of proof from the employer to the Petitioners herein. Petitioners were told to shoulder the burden of disproving the job relatedness of the POSS and MASS tests when, in point of fact, the employer had put on no evidence of job relatedness for the positions at issue within the Entergy system. This was an improper application of both 42 USC Section 2000e-2(k) the Civil Rights Act of 1991 and also violated the doctrine of Griggs v. Duke Power Company, 401 U.S. 424 (1971).

B. 42 USC SECTION 2000e-2(K) AND THE GRIGGS STANDARD

As a direct response to this Court's holding in Ward's Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). Congress

passed 42 USC Section 2000e-2(k) as part of the Civil Rights Act of 1991. This section overturns Ward's Cove, codifies and reinstates the earlier Griggs standard with relationship to cases involving disparate impact. See Davey v. City of Omaha, 107 F3d 587 (8th Cir 1997).

The provision states in the pertinent part:

> "(k) Burden of Proof in Disparate Impact Cases
> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race . . .and respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the

respondent refuses to adopt such alternative employment practice.

Subparagraph C then references that the showing needed in paragraph (A)(ii) shall be in accordance with the law as it existed pre- Ward's Cove as to the concept of "alternative employment practice."

The Respondents had the burden of proof in the District Court--not just the burden of producing evidence. An analysis of how they attempted to meet that burden shows the insufficiency of the evidence utilized and the error of deciding that Petitioners could produce nothing to refute same.

Title VII proscribes employment practices which may appear fair in form or facially neutral but which are

discriminatory in operation. Connecticut v. Teal, 457 US 440 (1982); Krauel v. Iowa Methodist Medical Center, 95 F3d 674 (8th Cir 1996). Griggs supra. If an employment practice which is otherwise facially neutral but in fact falls most harshly on one protected group, there must be ample justification advanced by the employer as to why this must be allowed. Houghton v. SIPCO, Inc. 38 F3d 593 (8th Cir. 1994); Krauel supra.

The standard implicated in this matter is the one utilized in Griggs. That decision is worth revisiting as a framework of analysis in this context, in light of the Congressional reinstatement of it.

In Griggs, African-American

employees at Duke Power Company who worked respondent's generating plant brought an action, pursuant to Title VII of the Civil Rights Act of 1964, challenging respondent's requirement of a high school diploma or passing of intelligence tests as a condition of employment in or transfer to certain jobs at the plant. These requirements were not directed at or intended to measure ability to learn to perform any particular job or category of jobs. While Title VII of the Civil Rights Act of 1964 made it an unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status

because of race, color, religion, sex, or national origin, § 703 (h) of the Act specifically authorized the use of any professionally developed ability test, provided that it is not designed, intended, or used to discriminate. The United States Supreme Court held that there was no showing of discriminatory purpose on the part of Duke Power Company in the adoption of the diploma/ test requirements. However, it also held that, absence of such discriminatory purpose would not necessarily save an otherwise facially neutral selection process if the practice served to disproportionately impact minorities on the basis of race, and, if, as here, an employment, practice that operates to exclude

African-Americans from employment cannot be shown to be related to job performance. In such cases the otherwise lawful practice is prohibited, notwithstanding the employer's lack of discriminatory intent. The Act requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate to discriminate even when done with a pure heart. While the Act did not proscribe testing, it did proscribe giving tests controlling force if such test invidiously discriminated against minorities absent business necessity.

The emphasis in Griggs was that a testing or other selection procedure that disproportionately impacted minorities had to be related to the specific jobs at

issue. This is clearly seen in the opinion authored by Justice Marshall:

> The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a *demonstrable relationship to successful performance of the jobs for which it was used.*
>
> Griggs v. Duke Power Co., 401 U.S. 424 (1971) at Page 431 (Emphasis supplied)

Put another way:

The question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program

Albemarle Paper Co. V. Moody, 422 U.S. 405 (1975) at Page 427

The Albemarle Paper decision goes on to discuss the working conditions and backgrounds at the specific plant at

issue in the case. It does not address the industry at large as does the Kleinke affidavit.

Job relatedness thus does not exist in a vacuum nor can it be determined by the jobs in the national market. There must be particular validation and a manifest relationship to the particular employment in question. Albemarle Paper supra. N.A.A.C.P., Inc. v. Tow of East Haven, 70 F3d 219 (2nd Cir. 1995) ; Nash v. Consolidated City of Jacksonville Duval County, 895 F.Supp 1536 (M.D. Fla 1995) The traits measured must be significantly related to the applicants ability to perform the job(s) in question and not focus on some minor aspect of the job. Gillespie v. State of Wisconsin, 771

F2d 2035 (7th Cir 1985) cert den. 474 US 1083

Nowhere did Respondents shoulder their burden of showing that the tests were valid in the manner in which they were used in this particular case, nor that the traits to be measured were not more than some minor facet of the particular jobs in question.

Respondents presented an affidavit by Dr. David J. Kleinke, a psychologist employed by the Edison Electric Institute ("EEI"). While the affidavit sings the praises of MASS and POSS, and goes into great and elaborate detail regarding the formulation of same, not once does it relate either test to the so-called "multicraft" jobs being considered within

the AP &L division of Entergy. Nor does Dr. Kleinke even address whether these tests are valid in a lay-off situation.

We are told that "during the 1980's" EEI invited twenty-five leading psychological and industrial organizations to formulate a testing procedure for selection of incoming employees into the electrical industry. We are told that Personnel Decisions Research Institute ("PDRI") was awarded the contract, not on the basis of lowest bid, but on the quality of their work.

PDRI did a comprehensive job analysis at that time. Dr. Kleinke states:

> PDRI followed the same procedure when designing and validating both tests. The first phase in each test

> design was completing a comprehensive job analysis with respect to positions for which candidates would be tested. For POSS, the covered jobs included all positions in the normal chain of progression for power plant operators. For MASS, the covered jobs included the maintenance helper and maintenance mechanic jobs.. . As part of the job analyses, PDRI researchers visited a number of power plants.
>
> Kleinke Affidavit, page 2

The affidavit goes on to note that about 3000 operators in seventy companies were tested in order to validate the scores.

The problem with all of this is that Griggs and Albemarle Paper are the controlling and reinstituted (and now codified) law of the land. See Davey v. City of Omaha, 107 F3d 587 (8th Cir 1997). Griggs requires that the testing measures

relate specifically to the job in question and both Griggs and 42 USC Section 2000e-2(k) place the burden of proof upon the employer. Dr. Kleinke's affidavit does not address several points. It was not up to Petitioners as non-moving parties to raise them.

Bearing in mind the standard that it appears that Petitioners could prove no set of facts to back their claims, the first issue becomes one of the dating of the study. Was this study validated in 1980 or 1989? Being a high-tech industry, undoubtedly the performance of the jobs in question changed to some degree in the fifteen years between 1980 and 1995.

Not once does the proof adduced by

Respondents show that the concerns addressed in the Kleinke affidavit relate specifically to the jobs at issue or AP & L in the year 1995. In the workplace there are at least two ways of doing things: 1. The norm; and 2. The way the job actually gets done at the company and location in question. Both the affidavit and the POSS/MASS tests speak to the norm. They do not address the Entergy way of doing things. They fall short of the validation required by Griggs/Albemarle Paper Company for job relatedness.

We are nowhere told in the affidavit what specific job knowledge, skills and abilities needed to perform the jobs in question are, and Respondents do not say,

how the POSS/MASS tests relate to those specific areas. Respondents raised no claim that the Petitioners were not properly doing their jobs at the time of their termination. These elements are crucial since the testing provided the only criterion by which these employees were terminated.

Dr. Kleinke's affidavit gives great amounts of information about POSS but curiously very little about how MASS was developed or how different it is from POSS. It is possible that some of the Petitioners who received only one of the tests could still be victims of discrimination, even if Entergy is able to document everything that Dr. Kleinke says in the affidavit. We know little

about the specific validation of MASS.

Dr. Kleinke also makes a sweeping statement of opinion that he knew of no other selection system that would do a better job. Taking this to be true, only for the sake of this argument, it is clear from the rest of Dr. Kleinke's affidavit that POSS/MASS are designed to be valid when hiring individuals off the street *from outside the industry*. There is absolutely no indication that these tests are valid when one considers the experienced personnel at issue herein.

These men are a known quantity. They are not new hires off the street. They have worked faithfully for AP &L for a number of years since that time; up til

now, no one has alleged that their performance was poor and they were not required to be men of the pen and paper. They worked with their hands and have now been fired because the company seeks "multicrafted" employees (which, in this context, will been a disparate number of minorities excluded--leading to a "younger, whiter" workforce as alleged in the complaint.) Even if POSS/MASS have some validity for the purpose of filling new jobs, there is nothing in the Kleinke affidavit to suggest it to be valid for determining who will be terminated. The use made of the test by Entergy simply exceeds the parameters indicated in the Kleinke affidavit.

Thus the bald assertion of

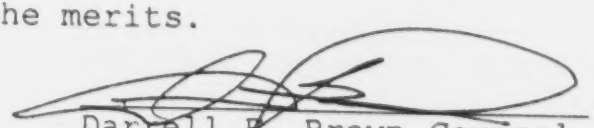
Respondents, which was accepted as truth by the District Court and the Court of Appeals, that the tests meet the requirements of the law (and particularly of the Uniform Guidelines of the Office of Federal Contract Compliance) is possibly true but proves nothing specific as regards the issues at bar. The Kleinke affidavit simply proves that POSS/MASS are valid indicators of performance for persons being hired off the street in at least some electrical power companies as those indicators relate to two broad, general classifications of jobs. In this regard, as used in this context, they do not significantly differ from the testing used in Griggs/ Albemarle Paper which any

rational person would have to admit was predictive of something--on the premise that the person testing higher on an I.Q. test will do somewhat better at most any job than his fellow testing lower--but which were legally infirm as a basis for discriminating as between employees. And, in any test, there will be some individuals who will do better on the job than they will at test taking, by reason of education, background and individual personality. We are not told how the validation of these tests take these factors into account.

Entergy has demonstrated no compelling need for the policy of testing with POSS/MASS and has further failed to demonstrate a lack of an effective

alternative policy which would not produce disparate impact. Bradley v. Pizzaco of Nebraska, Inc., 7 F3d 795 (8th Cir. 1993); Hawkins v. Anheuser-Busch, Inc. 697 F2d 810 (8th Cir 1983). These are statutory requirements.

For these reasons, Respondents did not carry their burden. The summary judgment should be overturned and remanded with instructions for trial of the merits.



Darrell F. Brown *Counsel of Record*
DARRELL F. BROWN & ASSOCIATES, P.A.
300 Spring Street, Suite 515
Little Rock, AR 72201
(501) 376-1845
Attorneys for Petitioners

APPENDIX A

United States Code 42 § 2000e-2

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis

of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if–

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative

employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one of employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule

barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use of possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal Law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

COTA B. ALLEN PLAINTIFF

VS. LR-C-95-812

ENTERGY CORPORATION, ET AL DEFENDANTS

ORDER

Pending before the Court are defendants' motions for summary judgment.

The plaintiffs, black linemen laid off from defendant Entergy Corporation (formerly Arkansas Power and Light ["AP&L"]), allege race discrimination by the company and the unions regarding their layoffs. Specifically, plaintiffs allege that the selection procedure utilized to conduct the employee reduction had a racially disparate impact on black employees in violation of Title VII of the Civil Rights Act of 1964. Plaintiffs seek reinstatement, backpay and damages. Both defendants have filed motions for summary judgment.

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is properly granted when, viewing the facts and reasonable inferences in the light most favorable to the non-moving party, it is clear that no genuine issue of material fact remains and the case may be decided as a matter of law. *Buller v. Brechler*, 706 F.2d. 844, 846 (8th Cir. 1983). The Court is required to resolve all conflicts of evidence in favor of the non-moving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d. 207, 210 (8th Cir. 1976). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The burden in [sic] on the moving party. *Mt. Pleasant v. Associated Electric Coop., Inc.*, 838 F.2d. 268, 273 (8th Cir. 1988). After the

moving party discharges this burden, the non-moving party must do more than show there is some doubt as to the facts. *Matshushita Elec. Industrial Co. V [sic]. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the non-moving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson*, 477 U.S. at 249; *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). With these principles in mind, the Court turns to an examination of the facts.

The undisputed facts reveal that plaintiffs were laid off in a reduction in force conducted by defendants in May, 1995. Defendants negotiated a side agreement to the existing collective bargaining agreement between the International Brotherhood of Electrical Workers ["IBEW"] and AP&L in which the parties agreed to conduct the reduction in force based upon a selection test, with every affected employee who passed the appropriate test being retained in accordance with seniority. The agreement reached gave the employees the right to take the test twice, if needed. The plaintiffs failed the aptitude test twice and were laid off. Other black employees in the plaintiffs' seniority classifications passed the test and were placed in jobs by seniority, including Dwight Jackson, James Burgess, Carnel Finley, Victor Hood, Marc Mariner, and

Marvis Gist. White employees who failed the test twice were laid off.

In *Albermarle Paper Co. v. Moody*, 422 U.S. 405 91975) [sic], the Court quoted from another Supreme Court decision that set forth the test to determine when a Title VII plaintiff will prevail on a disparate impact claim regarding the use of employment tests.

> In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has]…a manifest relationship to the employment in question.' This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. If an employers [sic] does then meet the burden of proving that its test are 'job related', it remains open to the complaining party to show that other tests or selection

> devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination.

Assuming plaintiffs met their prima facie case, defendants both filed motions for summary judgment attempting to show that the aptitude tests were properly validated and job related. They attached the affidavit of Dr. David J. Kleinke, a psychologist employed by Edison Electric Institute ["EEI"] as the Director of Employment Testing. EEI is an association of investor-owned electric utilities in the United States with approximately 180 member utilities. AP&L is a member of EEI.

Dr. Kleinke revealed that EEI became involved in development of a Plant Operator Selection System ["POSS"] and a Power Plant Maintenance Positions Selection System ["MASS"]. He states that POSS was designed to determine the potential for success of candidates for operator jobs in the power plant setting. Similarly, MASS was designed to help utilities select better-qualified maintenance workers.

Dr. Kleinke noted that the first phase in the development of the tests involved an extensive review of the published and unpublished research literature. The next phase in each test design was completing a comprehensive job analysis with respect to positions for which candidates would be tested. Additionally, a number of power plants were visited and operators were observed in action. Numerous supervisors and trainers of operators were interviewed regarding operator job duties and job descriptions. From this information, a questionnaire and test battery were developed and administered.

Dr. Kleinke observed that Entergy used a POSS test battery consisting of three portions: a cluster of Aptitude Tests, a Previous Experience Questionnaire, and a Personnel Questionnaire. The aptitude portion consisted of paper-and-pencil tests measuring abilities found to be important to successful plant operator job performance, such as visualization of three-dimensional figures in space, mathematical ability, reading comprehension, abilities to deal with mechanical concepts, and reading tables and graphs. The Previous Experience Questionnaire assessed the candidate's interests and experiences in work, school, and recreational situations. The Personnel Questionnaire measured typical behavior. It assessed "aspects of

temperament found to be related to emotional stability." This questionnaire was used because the job analysis for both POSS and MASS revealed that certain personality traits are associated with good job performance. The three POSS indices were combined for an "Overall Potential Index." The Aptitude Index was weighted one-half, the Experience Index one-third, and the Personnel Index one-sixth. This single combined measure predicts an applicant's overall effectiveness in plant operations.

Dr. Kleinke stated in his affidavit that in his professional opinion the development and validation of the tests given the plaintiffs are consistent with the requirements of the Uniform Guidelines on Employee Selection Procedures ["Uniform Guidelines"]. He stated further that in his professional opinion, the development and validation of the tests established the job-relatedness of the tests. Dr. Kleinke also stated that the Department of Labor's Office of Federal Contract Compliance Programs ["OFCCP"] conducted a two-year review of the validity evidence on both tests given to company employees and that based on its study, the OFCCP concluded that the validation studies meet the professional standards required by the Uniform Guidelines.

Plaintiffs filed a response to the motions for summary judgment and attached

the affidavits of several plaintiffs. Rather that setting forth specific facts to refute the job relatedness of the tests, plaintiffs make conclusory statements that the use of the "testing device does not take into consideration the previous inequities and acts of discrimination in the work force". *(Plaintiffs' Statement of Material Facts,* paragraph 6*)*. Plaintiffs do not put forth any proof to counter defendants' proof that the aptitude tests reveal a "manifest relationship to the employment in question." *Griggs*, 401 U.S. at 424. The Court finds there are no genuine issues of material fact remaining for trial on the issue of the "job relatedness" of the aptitude tests. The affidavit of Dr. Kleinke clearly establishes that the aptitude tests at issue are valid selection criteria and are job related. Plaintiffs, as the non-moving parties, have failed to refute this testimony with specific factual evidence that would create a jury issue for trial.

In response to defendants' motion for summary judgment, plaintiffs attempt to make a showing of "pretext". They allege that there was an alternative selection procedure which would not have created an adverse impact on the plaintiffs as a group. They seem to indicate in their Statement of Material Facts that seniority and experience have long been criteria used to determine

whether to retain or to terminate an employee and that this method would have resulted in many of the plaintiffs being retained. Dr. Kleinke stated in his affidavit that he was unaware of any selection system that would do a better job of selecting employees for jobs such as those at issue in this case. He further stated that he was unaware of any selection system that would do as valid and useful a job of selecting employees for jobs such as those at issue in this case. Plaintiffs have failed to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' They simply state, without citing any proof that the seniority method would be a more fair method of selection.

Plaintiffs had the burden of coming forward with responsive evidence to show that there exists genuine issues of material fact for trial. Having wholly failed in this regard, the Court finds defendants' motions for summary judgment must be granted.

SO ORDERED this 24th day of March, 1998.

/S/

UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 98-2187

Cota B. Allen; Leon Bee; Rickey Billingsley; Charles Doyle; Mason C. Foster; Lawrence Hancock; Jim Ingraham; Charles Hester; Joe M. Lewis; Larry McClain; Claude Miller; William Morris; Ernest Pointer, III; Clifford W. Robinson; Andrew Taylor; Willis Warner; Ira L. Whitfield; Bernard Wooten,
Appellants,

v.

Entergy Corporation; Arkansas Power and Light Company; International Brotherhood of Electrical Workers, Local 750; International Brotherhood of Electrical Workers, Local 647,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas

---

Submitted: February 12, 1999
Filed: June 22, 1999.

Before WOLLMAN, Chief Judge,1 LOKEN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

The plaintiffs are African-American employees who, as a result of a reduction in force, were laid off from their employment at one of two electrical generating plants owned by Entergy Corporation, formerly known as Arkansas Power and Light. The plaintiffs brought this race discrimination suit, challenging the validity of the selection procedure used by Entergy Corporation to determine which employees to law off. They also argued that their union (two local chapters of the International Brotherhood of Electrical Workers) did not adequately represent their interests when it acquiesced in the selection procedure. The district court2 granted summary judgment in favor of Entergy Corporation and the union. We affirm.

---

1 The Honorable Robert L. Wollman succeeded the Honorable Pasco M. Bowman as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the end of the day on April 23, 1999.

2 The Honorable Stephen M. Reasoner, United States District Judge for the Eastern District of Arkansas.

I.

The district court states the undisputed facts as follows. The plaintiffs were laid off in a reduction in force conducted by Entergy Corporation in May 1995. To facilitate the layoff, the company and the union negotiated a side agreement to the existing collective bargaining agreement, requiring all employees to take a selection test to determine which employees would be laid off. Two aptitude tests were used for the selection process—the Plant Operator Selection System (POSS) and the Power Plant Maintenance Positions Selection System (MASS)—which had been used for years by Arkansas Power and Light in the hiring process. The company agreed to allow each person to take the test twice if necessary. The plaintiffs did not pass the test after two attempts and were laid off, as were white employees who failed the test twice. Those who passed the selection test, including several African-American employees in the same seniority classifications as the plaintiffs, were retained and placed in jobs by seniority.

The plaintiffs brought this Title VII race discrimination suit against the union and the company, contending that the selection tests had a disparate impact on African-American employees, that the tests were not job related, and

that the union improperly bargained away the use of the less discriminatory seniority system with which to make the layoff selections. The company and the union filed motions for summary judgment, contending that they negotiated the selection process in good faith and that the selection tests were properly validated as job related according to EEOC guidelines. The district court granted summary judgment to the company and the union, concluding that the plaintiffs failed to offer any proof to counter the validity and job relatedness of the aptitude tests. The plaintiffs now appeal.

II.

We review de novo the district court's grant of summary judgment, applying the same standards as the district court. Mayard v. Hopwood, 105 F.3d. 1226, 1227 (8th Cir. 1997). Summary judgment is appropriate if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. We view the facts and the inferences to be drawn from those facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A party resisting a properly supported summary judgment motion may not rest upon the mere allegations or denials of the

pleadings, but by affidavit or otherwise as provided by Rule 56 must set forth specific facts showing the existence of a genuine issue for trial. See Dancy v. Hyster Co., 127 F.3d. 649, 653 (8th Cir. 1997), cert. denied 118 S.Ct. 1186 (1998); see also Fed. R. Civ. P. 56(e).

"Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement has a manifest relationship to the employment in question.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)) (alterations omitted). The standard of proof articulated in the Griggs case and codified in 42 U.S.C. § 2000e-2(k) states that where the plaintiff has made a prima facie case of disparate impact from a selection procedure, the burden then shifts to the employer to justify the procedure by showing that it is related to safe and efficient job performance. See Donnell v. General Motors Corp., 576 F.2d. 1292, 1299 (8th Cir. 1978). Once the employer meets this burden, the plaintiff must show that an alternative selection method exists, having substantial validity and less of an adverse impact; if such an alternative exists, the employer must choose the less discriminatory method. See Hawkins v. Anheuser-Busch Inc., 697 F.2d. 810, 816 (8th Cir. 1983).

The parties apparently concede for summary judgment purposes that the plaintiffs set forth a prima facie case of disparate impact resulting from the testing procedures. The plaintiffs argue on appeal that there remains a material issue of fact concerning whether the company satisfied its burden of demonstrating that the selection tests were sufficiently related to the specific jobs the plaintiffs sought. In support of summary judgment, the company submitted the affidavit of Dr. David J. Kleinke, a psychologist employed as Director of Employment Testing for the Edison Electric Institute, which developed the tests used here. His affidavit explains the development of the tests. For each test, a checklist of crucial tasks was compiled by questioning thousands of plant operators and maintenance workers in fossil fuel power plants throughout the country. Based on this checklist of important tasks, an experimental testing battery was developed and sampled in the industry. Performance evaluations were mathematically correlated with the test results and confirmed that higher test scores indicated a likelihood of better job performance. Dr. Kleinke stated that the tests enable power plants to choose employees who are more readily trainable and who work in a safer fashion, minimizing incidents. The union also submitted the affidavits of union

business managers Gary Mitchell and Bill Heavener, who each stated that these aptitude tests had been used by Arkansas Power & Light Company "for years in the hiring process." (Appellees' App. at 7, 15).

Dr. Kleinke expressed an opinion that the development and validation of the tests are consistent with the requirements of the EEOC's Uniform Guidelines on Employee Selection Procedure. "The EEOC has issued 'Guidelines' for employers seeking to determine, through professional validation studies, whether their employment tests are job related." Albemarle Paper Co., 422 U.S. at 430-31; see 29 C.F.R. pt. 1607. While these guidelines have not been promulgated pursuant to formal procedures established by Congress, see Albemarle Paper Co., 422 U.S. at 431, they are nevertheless "entitled to great deference" as "[t]he administrative interpretation of the Act by the enforcing agency," Griggs, 401 U.S. 433-34. The EEOC Guidelines and the Griggs case present the same message--tests with a discriminatory impact are impermissible unless the employer demonstrates through professional acceptable methods that the tests are job related. See Albemarle Paper Co., 422 U.S. at 431. Dr. Kleinke stated in his opinion that the development and validation of the tests at issue demonstrate that they are job related.

He also stated that following a two-year review of the validity of the tests, the Department of Labor's Office of Federal Contract Compliance Programs conclude in 1991 "that the validation studies for both tests meet the professional standards required by the Uniform Guidelines." (Appellees' App. at 129.) Dr. Kleinke was unaware of any selection system that would do a better job of selecting qualified employees for the plant operator or maintenance worker positions.

Entergy Corporation also asserts that simultaneously with the reduction in force, it was combining separate jobs of power plant operator and power plant maintenance into one "multi-craft" position, which required each worker to perform the tasks of both jobs. The company used the aptitude tests to help facilitate this change. The company required each employee to take an aptitude test in a basic area other than the worker's own craft to determine the suitability of an existing worker for continued employment in the new multi-craft positions.

In response to the defendants' motions for summary judgment, the plaintiffs submitted their own affidavits, mostly complaining of discriminatory treatment by the company in general, complaining of the union's conduct in acquiescing to the tests, or

complaining of the manner in which the tests were administered. Only one plaintiff, Clifford Robinson, submitted an affidavit purporting to rebut the job relatedness of the tests. Mr. Robinson stated in conclusory fashion that the test he took was biased and "had no relevancy to the jobs that [he] performed." (Appellants' App. at 65 (emphasis omitted).)

This statement is insufficient to preclude summary judgment. Mr. Robinson's affidavit does not explain how the test differed from either the old job he performed or the new job he sought that required multi-craft skills. Mr. Robinson's conclusory affidavit "is devoid of any specific factual allegations" challenging the validity of the test, and as such, it cannot withstand a properly supported summary judgment motion. Flannery v. Trans World Airlines, Inc., 160 F.3d. 425, 428 (8th Cir. 1998). The plaintiffs did not offer any expert testimony, or any other evidence, to rebut Dr. Kleinke's affidavit testimony that the tests were valid and job related. Likewise, the plaintiffs offered nothing to rebut Dr. Kleinke's testimony about the Department of Labor's conclusion that the tests are consistent with the EEOC guidelines, which require selection tests to be job related. The record includes the unrebutted testimony that the same tests have been used for years in the hiring

process at the power plants where the plaintiffs worked and that the company needed the aptitude tests to indicate whether the existing employees would be suitable for the new multi-craft positions. One plaintiff's conclusory assertion that the test was not related to the job he had performed is insufficient to prevail over the defendants' properly supported summary judgment motion. See Rose-Matson v. NME Hospitals, Inc., 133 F.3d. 1104, 1109 (8th Cir. 1998) ("Conclusory affidavits, standing alone, cannot create a genuine issue of material fact precluding summary judgment.")

The plaintiffs contend alternatively that even if the defendants met their burden to demonstrate that the tests were valid and job related, they still are not entitled to summary judgment because a less discriminatory selection procedure was available. They assert that the seniority system, which was abandoned as a selection methods for the reduction in force by agreement of the union in favor of the POSS/MASS testing systems, was an available alternative selection procedure which would cause less of a disparate impact on minorities, and accordingly, the company and the union acted improperly by abandoning the seniority system. In response, the defendants point to Dr. Kleinke's expert opinion that he knew of no other tests that would substitute for the POSS and MASS and be

equally job related.

There is no question that a seniority system is a legitimate and non-discriminatory basis for accomplishing a reduction in force. See Bright v. Standard Register Co., 66 F.3d. 171, 173 (8th Cir. 1995). This does not mean, however, that an aptitude selection test is necessarily illegally discriminatory. The defendants established that the tests were valid and job related, and demonstrated that they were necessary to determine which employees would be best suited to the new multi-craft positions. The plaintiffs make only a conclusory argument that the seniority system would have been less discriminatory. They make no showing to suggest that seniority in the previous single-craft positions would be an equally accurate predictor of success in the new multi-craft positions.

III.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest: CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2187EALR

Cota B. Allen, et al., Appellant

vs.

Entergy Corporation, et al., Appellees

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Richard S. Arnold took no part in the consideration or decision of this case.

(5128-010199)

August 10, 1999

Order entered at the direction of the Court: /s/ Michael E. Gans, Clerk, U.S. Court of Appeals, Eighth Circuit